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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215896
Party	Defendant Innovation Brewing
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Signature	/Ian D. Gates/
Date	02/25/2016
Attachments	Applicant's Motion for Sanctions 2-25-2016.pdf(199792 bytes) Declaration of Ian D. Gates in Support of Applicant's Motion for Sanctions 2-25-2016.pdf(184388 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BELL’S BREWERY, INC.,)	
)	Opposition No. 91215896
Opposer,)	
)	Application Serial No. 85/929,587
v.)	
)	
INNOVATION BREWING,)	
Applicant.)	
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APPLICANT’S MOTION FOR SANCTIONS

Applicant Innovation Brewing (“Applicant”), pursuant to Trademark Rule 2.116 and Rule 37(c)(1) of the Federal Rules of Civil Procedure, hereby moves the Trademark Trial and Appeal Board (“Board”) for entry of sanctions against Opposer Bell’s Brewery, Inc. (“Opposer”), prohibiting Opposer’s introduction of and reliance on any of approximately four hundred seventy-five (475) documents totaling one-thousand three-hundred thirteen (1,313) pages¹ produced on February 5, 2016, four-hundred fifty-one (451) days following Applicant’s service of its first set of requests for production to which the documents were responsive. This recent document production on the eve of trial accounts for approximately 60% of the total number of documents produced by Opposer over the course of the present opposition.

Applicant concurrently submits herewith a Declaration of Ian D. Gates, dated February 25, 2016 (“Gates Decl.”).

¹ Labeled as BELLS-001997 through BELLS-003309.

I. Facts.

On November 11, 2014, Applicant served on Opposer “Applicant’s First Set of Interrogatories, First Set of Requests for Admissions, and First Set of Requests for Production” (“Applicant’s First Requests”). [Gates Decl. ¶ 2.] In particular, the requests for production included eighteen (18) enumerated requests, including, for example, a request to “[p]roduce all Documents and Things that support Opposer’s opposition of Applicant’s INNOVATION BREWING mark.” [*Id.*]

On January 8, 2015, Opposer provided a link to an electronic data store of approximately one-hundred (100) documents totaling one-hundred eighty-six (186) pages, identified as “Opposer’s document production.” [*Id.* at ¶ 3.]

On March 20, 2015, Opposer provided a link to an electronic data store of approximately forty (40) documents totaling three-hundred twenty-eight (328) pages, identified as “Opposer’s supplemental document production.” [*Id.* at ¶ 5.]

Also on March 20, 2015, Applicant served on Opposer “Applicant’s Second Set of Interrogatories, Second Set of Requests for Admissions, and Second Set of Requests for Production” (“Applicant’s Second Requests”). [*Id.* at ¶ 4.] Opposer’s supplemental production of March 20, 2015, however, was available to Applicant prior in time to Applicant’s serving of Applicant’s Second Requests, and therefore was responsive to Applicant’s First Requests and not to Applicant’s Second Requests.

On May 7, 2015, Opposer provided a link to an electronic data store of approximately two-hundred (200) documents totaling one-thousand four-hundred eighty-three (1,483) pages, identified as “Opposer’s Supplemental Production.” [*Id.* at ¶ 6.]

On February 5, 2016, four-hundred fifty-one (451) days following Applicant's serving of its first set of requests for production, three-hundred twenty-two (322) days following the close of discovery, and on the deadline for Opposer's pretrial disclosures, Opposer provided a link to an electronic data store of approximately four-hundred seventy-five (475) documents totaling one-thousand three-hundred thirteen (1,313) pages, identified as "our client's supplemental production." [*Id.* at ¶ 7.] A brief review of the approximately 475 documents, reveals that at least a subset of the documents date back to 2013 and 2014. [*Id.* at ¶¶ 8 and 9.] Moreover, several documents appear potentially to have been produced in duplicate or even triplicate. [*Id.* at ¶ 11.]

On February 9, 2016, within two business days of receiving Opposer's link, Applicant's counsel objected to the timing of the recent document production. Over the course of the subsequent two weeks, the parties exchanged letters and held a teleconference in an effort to reach an agreement as to Opposer's reliance on the recently produced documents at trial. During this exchange, Opposer's counsel confirmed that the recent document production was responsive to Applicant's First Requests and asked that Applicant's counsel identify which specific documents of the approximately 475 recently produced documents (1,313 pages) were being objected to and for what reason. Applicant's counsel indicated that Applicant was objecting to the timing and volume of the document production at this late stage in the opposition. [*Id.* at ¶ 10.]

II. Legal Standard.

Trademark Rule 2.116 *et seq.* provides the basis for application of the Federal Rules of Civil Procedure in Board proceedings, with 37 CFR 2.120 corresponding to discovery, and with 37 CFR 2.120(d)(2) applying to producing documents for inspection under Federal Rule of

Civil Procedure 34. The purpose of discovery, in litigation or in a Board proceeding, is to—very early in the proceedings—enable the parties to understand the nature of their adversary’s case, propose settlement, and otherwise efficiently advance the dispute toward a resolution. *See, e.g.*, Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 401:

At the very least, taking discovery enables the propounding party to propose to the responding party stipulations of fact, stipulations as to procedures for introducing into the record evidence produced in response to discovery requests, and to otherwise prepare for trial. Propounding and responding to discovery may further lead parties to stipulate to narrowing the issues for trial, or to stipulate to expedited determination of their case under the Board’s Accelerated Case Resolution (ACR) process.

Moreover, parties must make a good faith effort to satisfy the reasonable and appropriate needs of their adversaries. *Panda Travel Inc. v Resort Option Enterprises, Inc.*, 94 USPQ2d 1789, 1791 (TTAB 2009). *See also Hot Tamale Mama...and More, LLC v. SF Investments, Inc.*, 110 USPQ2d 1080, 1081 n.1 (TTAB 2014) (simply ignoring deadlines to serve discovery responses or seek an extension of time to do so is inconsistent with the Board’s expectation that the parties and their attorneys cooperate in the discovery process).

Federal Rule of Civil Procedure 37 relates to the failure to cooperate in discovery and corresponding sanctions. More specifically, Rule 37(c)(1) provides that if a party fails to supplement its discovery responses, “the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Moreover, subpart (C) of Rule 37(c)(1) expressly makes available the sanction set forth in Rule 37(b)(2)(A)(ii) (“prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence”).

The Board interprets Rule 37(c)(1) to extend beyond merely a complete failure to supplement discovery responses, and specifically to situations where the supplemental responses

are tardy. TBMP § 408.03 (“This is not an invitation, however, to hold back material items and disclose them at the last minute. A party who does so may be subject to the preclusion sanction set forth in Fed. R. Civ. P. 37(c)(1).”).

III. Argument.

Opposer has produced approximately eight-hundred fifteen (815) documents totaling three-thousand three-hundred nine (3,309) pages during the course of the present opposition. Approximately sixty (60) percent of the produced documents were produced on the eve of trial and included documents dating back to 2013. The issues in this opposition are minimal and straight forward—likelihood of confusion in connection with an intent-to-use application. Throughout this opposition, Opposer has revealed itself to continually play the litigation game against its much smaller adversary with lesser means—with false hopes of settlement, an unconsented motion to suspend, last minute depositions, a motion that was subsequently withdrawn, a motion to amend at the close of discovery, a motion to compel a new 30(b)(6) witness, a petition to the Director, and now this voluminous and tardy document production.

Applicant timely served its first set of discovery requests with ample time to receive and review Opposer’s responses during the discovery period, such as to understand the nature of Opposer’s case and to have an opportunity to request additional discovery during the discovery period should it be needed. Opposer’s delay in producing 60% of its responsive documents until the eve of trial, nearly one year following the close of discovery, prevents Applicant from utilizing the discovery tools that are only available during the discovery period. If Opposer is permitted to rely on the recently produced documents, Applicant is prevented from exploring the nature of such documents via discovery. Applicant also is prejudicially burdened with reviewing

a large volume of documents, which ultimately may have no bearing on the outcome of this dispute.

In an effort to understand the nature of the recent voluminous document production, Applicant inquired with Opposer as to the nature of the documents, including the date at which they came into existence or into Opposer's possession, and over the course of two weeks of exchanging letters and a teleconference, Applicant still does not understand why such a large volume of documents were produced at such a late date, particularly in view of the production including documents dating back to 2013. In fact, during this exchange, Opposer placed on Applicant the expectation of identifying to which of the 1,313 pages of documents Applicant objected. Applicant should not be burdened with such a task as a result of Opposer's timing and volume of its recent document production.

In short, the burden is great on Applicant to review and consider in detail 1,313 pages of documents produced last minute on the eve of trial. Applicant recognizes its right to file one or more motions to strike and/or to object to the relevancy of introduced documents during trial, but Applicant should not be burdened with doing so due to Opposer's excessive delay in producing these documents. Applicant thus will be severely prejudiced if Opposer is permitted to rely on such documents at trial and submits that the only just remedy under these circumstances is for Opposer to be prohibited from relying at trial on the documents produced on February 5, 2016.

III. Conclusion.

For the foregoing reasons, Applicant requests that Opposer be prohibited from relying on any of the documents that it recently produced to Applicant on February 5, 2016, labeled as BELLS-001997 through BELLS-003309.

DATED this 25th day of February, 2016.

CERTIFICATE OF E-FILING

I hereby certify that this correspondence
is being transmitted electronically via
the United States Patent and Trademark
Office's ESTTA-Web System on
February 25, 2016.

/Ian D. Gates/

Ian D. Gates

Respectfully submitted,

DASCENZO INTELLECTUAL
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/Ian D. Gates/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Applicant's Motion for Sanctions is being served on Opposer by First Class Mail on February 25, 2016 to:

Sarah M. Robertson
Dorsey & Whitney LLP
51 West 52nd Street
New York, NY 10019-6119

/Ian D. Gates/
Ian D. Gates
Of Attorneys for Applicant

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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BELL'S BREWERY, INC.,)	
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INNOVATION BREWING,)	
Applicant.)	
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**DECLARATION OF IAN D. GATES IN SUPPORT OF APPLICANT'S
MOTION FOR SANCTIONS**

I, IAN D. GATES declare as follows:

1. I am an attorney at DASCENZO Intellectual Property Law, P.C., representing Applicant, Innovation Brewing ("Applicant"), in the above captioned Opposition proceeding. I am licensed to practice law in the State of Oregon. I submit this Declaration for the purpose of setting forth certain facts in support of Applicant's Motion for Sanctions filed on February 25, 2016.

2. On November 11, 2014, Applicant served its first set of discovery requests, including a first set of requests for production, on Opposer. In particular, the requests for production included eighteen (18) enumerated requests, including, for example, a request to "[p]roduce all Documents and Things that support Opposer's opposition of Applicant's INNOVATION BREWING mark."

3. On January 8, 2015, Opposer provided a link to an electronic data store of approximately one-hundred (100) documents totaling one-hundred eighty-six (186) pages, identified as “Opposer’s document production.”

4. On March 20, 2015, Applicant served its second set of discovery requests, including a second set of requests for production, on Opposer.

5. On March 20, 2015, Opposer provided a link to an electronic data store of approximately forty (40) documents totaling three-hundred twenty-eight (328) pages, identified as “Opposer’s supplemental document production,” presumably responsive to Applicant’s first set of discovery requests, as Opposer had not yet received Applicant’s second set of discovery requests at the time.

6. On May 7, 2015, Opposer provided a link to an electronic data store of approximately two-hundred (200) documents totaling one-thousand four-hundred eighty-three (1,483) pages, identified as “Opposer’s Supplemental Production,” presumably responsive to one or both of Applicant’s first and second sets of discovery requests.

7. On February 5, 2016, Opposer provided a link to an electronic data store of approximately four-hundred seventy-five (475) documents totaling one-thousand three-hundred thirteen (1,313) pages, identified as “our client’s supplemental production.”

8. Pages BELLS-002336 and BELLS-002337 of the recently produced documents correspond to a press release for the debut of a new seasonal beer, Smitten Golden Rye Ale. An Internet search for the press release reveals that it was made available at least as early as January 7, 2013 at <http://beerpulse.com/2013/01/bells-smitten-golden-rye-ale-makes-debut-in-february/>.

9. Pages BELLS-002338 and BELLS-002339 of the recently produced documents correspond to a press release for Bell's beer becoming available in New York City. An Internet search for the press release reveals that it was made available at least as early as February 2014 at <http://www.pmq.com/February-2014/Bells-beer-will-launch-in-New-York-City-and-on-Long-Island-this-month/>.

10. On February 9, 2016, I objected to the timing of the recent supplemental production. Over the course of the two weeks following Opposer's recent document production, counsel for the parties exchanged letters and held a teleconference in an effort to reach an agreement as to Opposer's reliance on the recently produced documents at trial. During this exchange, Opposer's counsel confirmed that the recent document production was responsive to Applicant's first set of requests for production. During a teleconference on February 23, 2016, Opposer's counsel asked me to identify which of the 475 recently produced documents were specifically being objected to and the reasons for objection. I indicated that Applicant was objecting to the timing and volume of the recent document production. Opposer identified the nature of two of the approximately 475 recently produced documents but was not prepared to identify the nature of the remaining documents.

11. From a brief review of the recently produced documents, it appears that the documents include at least financial information, labels for Opposer's products, electronic copies of marketing material, photographs of marketing material, and photographs of marketing events. Moreover, many appear to have been produced in duplicate or even triplicate.

Pursuant to 28 U.S.C. §1746, I, Ian D. Gates, further declare under penalty of perjury that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated: February 25, 2016

/Ian D. Gates/
Ian D. Gates

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Declaration of Ian D. Gates in Support of Applicant's Motion for Sanctions is being served on Opposer by First Class Mail on February 25, 2016 to:

Sarah M. Robertson
Dorsey & Whitney LLP
51 West 52nd Street
New York, NY 10019-6119

/Ian D. Gates/

Ian D. Gates
Of Attorneys for Applicant